No. 10,381

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. BUTLER, et al.,
Appellants,

vs.

GRACE APPLETON McKEY,
Appellee.

APPELLEE'S CLOSING BRIEF IN SUPPORT OF PETITION FOR REHEARING.

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In view of the fact that appellants, in their reply to appellee's petition for rehearing, have in some places therein incorrectly interpreted decisions, and in other places understated facts in other decisions, we believe that a short closing brief on behalf of appellee may be of some assistance to the Court in passing upon the petition.

I.

ANSWER TO APPELLANTS' POINT I, THAT: "THIS COURT DID NOT HOLD THAT CALIFORNIA LAW RATHER THAN FEDERAL LAW GOVERNS THE QUESTION WHETHER DEFECTS IN THE MODE OF PROOF RELATING TO THE PUBLICATION OF SUMMONS RENDERS A FEDERAL JUDGMENT VOID."

This Court in its opinion did very definitely call attention to the fact that the California law applied when determining whether or not there was a valid service of process upon a defendant in this state.

Appellants, lacking confidence in their argument as to the California Courts' interpretations of Section 412 of the California Code of Civil Procedure, seek to have this Court disregard the California cases cited by appellee, and accept decisions of Federal Courts interpreting laws of other states as determinative thereof. And to do this, they argue that the question of whether or not the judgment is void is a Federal question rather than one for interpretation by state Courts. In this argument they ignore entirely the fact that in any Court, a judgment is void for lack of jurisdiction if there has been no service upon the defendant. And since, as this Court admits that under the rule, the service upon a defendant in a Federal Court must be made in accordance with the requirements of the state law, if under the state statute, as interpreted by the Courts of the State, a legal service has not been had, Courts Federal or State must adopt the conclusion that the judgment predicated upon such an invalid service is void.

On page 3 of their reply to the petition for rehearing, appellants cite *Thompson v. Thompson,* 226 U.S.

555-556 to the effect that that Court there held that, even if the Virginia law which was there being interpreted declared a published service, based upon an affidavit made wholly upon information and belief, was insufficient, the judgment would not be a nullity. The Supreme Court in that case reached no such conclusion. The first thing the Court did in that case was to search the laws of Virginia to see whether an information and belief affidavit was a sufficient base for an order for publication of summons in that State. Finding none, the Court determined that the affidavit was sufficient. Appellants' counsel say with reference to the *Thompson* decision that:

> "The court said that even if the Virginia law did not sanction such affidavit, the judgment would not be a nullity."

What the Court did say, after reciting that it had been unable to find any Virginia code provisions or decisions that prohibited the use of information and belief affidavit, was:

> "In the very decree before us the Virginia court has adjudged such an affidavit to be sufficient. We are therefore bound to assume that the use of such an affidavit is in accord with proper practice in that state."

Then the Court went on to say "But were it otherwise" (meaning, of course, that if the Virginia Court had not adjudged the affidavit sufficient) it seemed well settled that the fact that the affidavit was defective "not in omitting the stating of material fact, but in the mode of stating it" did not render the

judgment void on its face. The Court then cites a Nebraska case, two Michigan cases, a Kansas case and a New York case, and the Ency. of Pleading and Practice, and *no* Federal decision. And the Court finally says:

> "In the absence of any local law excluding the use of such an affidavit, the decision of the state court, accepting it as legal evidence, must be deemed sufficient on collateral attack, to confer jurisdiction in that court over the subject matter, in accordance with local laws."

So what that Court held was that the judgment in that case was not subject to collateral attack "in the absence of any local law excluding the use of such an affidavit." The California decisions cited by us in our petition for rehearing disclose that the local law of California *does exclude* the use of such an affidavit.

On page 3 of appellants' reply, the case of *Pennoyer v. Neff,* 95 U. S. 714, is cited to the effect that there the Supreme Court overruled a trial Court which held that the affidavit for publication of summons was defective. It will be observed that the synopsis of the argument of both parties in that case (which precedes the opinion in the report) makes no mention of the claimed *defects* relied upon by the defendant in error in that case, and the decision itself fails to mention what defects were complained of, and there is nothing at all to indicate what the Oregon law was as to the proposition. Hence, that case is not authority for the proposition that Federal Courts will not recognize decisions of State Courts, holding service, made under

the laws of respective Courts, to be void because of failure to comply with the State statutes.

Appellants' citations of *Marx v. Ebner,* 108 U. S. 314 (Appellants' Reply, page 3), and *Cohen v. Portland Lodge,* 152 Fed. 357 (cited on page 4 of the reply) are of no assistance. We discuss them later herein, in answer to appellants' point VI.

II and III.

APPELLANTS' POINTS II AND III COMPRISE AN ANALYSIS OF POINTS RAISED BY US ON THE PETITION FOR A REHEARING AND A DISCUSSION OF THE CASES CITED BY US. THERE IS NOTHING SAID BY APPELLANTS UNDER THOSE HEADINGS WHICH REQUIRES FURTHER DISCUSSION BY US.

IV.

ANSWER TO APPELLANTS' POINT IV, THAT: "THE JUDGMENT IS NOT VOID FOR THE REASONS CONTENDED BY PETITIONER THAT APPELLANTS FAILED TO ESTABLISH BY AFFIDAVIT THAT NO CERTIFICATE OF RESIDENCE WAS FILED BY APPELLEE IN SAN FRANCISCO." (Appellants' Reply, p. 13.)

Appellants start out their argument with the statement that they had in vain searched appellee's brief in order to find an allegation that such certificate had been filed.

The *jurisdiction* of the Court, when ordering publication of summons, depends upon the sufficiency of the showing for the order. No action of the plaintiff

or statement of the defendant, *after the order was made,* can affect that jurisdiction one iota.

Next counsel argue that whether "the facts necessary for a publication of summons were present" is the first concern of the Court, and if the facts were present the judgment is safe from a collateral attack. That is rather a strange statement—in other words if the facts were present and no affidavit were filed, the Court would still have jurisdiction.

In support of this strange proposition appellants cite *Thompson v. Thompson* (supra), which as we have shown, supports no such theory.

Appellants also cite the California cases of *Herman v. Santee,* 103 Cal. 519; *City of Salinas v. Luke Kow Lee,* 217 Cal. 252 and *Kaufman v. Mining Syndicate,* 16 Cal. (2d) 90, to the same point. The two first cited cases have to do with *affidavits of publication,* which is an entirely different thing. The *jurisdiction* of the Court to order publication is dependent upon the *showing* made under the statute. The jurisdiction to render judgment following default is dependent upon whether service was in fact made as ordered—consequently if an affidavit to establish the fact of publication—is defective and does not state the facts it may be corrected. We discuss those cases in our "Brief for Appellee" pp. 39 and 40. *Kaufman v. California Mining Syndicate,* was discussed by us in our "Brief for Appellee", p. 43.

Appellants' next effort to avoid the point that the affidavit, as to the lack of a certificate of residence, was insufficient because based upon information and

belief, is to cite the case of *Davis v. Ramont,* 66 Cal. App. 778, and *City of Salinas v. Lee* (supra). In each of those cases the order of publication was based upon an affidavit setting out that the defendant was a non-resident, and the Court held that where the defendant was a non-resident it was not necessary to prove that no certificate of residence was on file in the state. The reason for this, of course, is obvious.

To make those cases appropriate to the matter now before the Court, appellants proceed to distinguish between an order for publication of summons on the basis that the defendant after due diligence cannot be found within the state; and one predicated upon the fact that the defendant conceals himself to avoid service. It seems to us perfectly obvious that if a person conceals himself to avoid service and is successful in that venture, then he cannot after due diligence be found within the state; and that therefore and under Section 412, the affidavit before giving the Court jurisdiction, for an order of publication, has to disclose whether or not the certificate of residence provided for by Section 1102 of the Civil Code has been filed for record.

Appellants next argue that petitioner appellee failed to state in her petition "any authority or reason why hearsay statements in an affidavit of this type concerning the filing of a certificate of residence should have other effect upon the judgment upon collateral attack than another hearsay statement in the same affidavit."

Under authorities we have heretofore cited, there is not any distinction, because an affidavit based upon hearsay is not proof by affidavit as required by the code section. However, there is this to say about it: that with reference to this part of the affidavit, appellants' counsel cannot argue that anywhere else in the affidavit the affiant has alleged positively and directly that no certificate of residence was on file. Of course, the answer to the present point is that under the law of California, an affidavit purporting to state upon information and belief what appears or does not appear in a public record is no evidence at all.

We do not consider appellants' final argument upon this point, to the effect that no one could state definitely in the negative with reference to the record worthy of serious considerations. That is rather a strange argument in view of the fact that all county records are indexed in accordance with legal requirements, and anybody can examine the index and determine definitely whether or not a particular document is indexed. Of course, the answer is very obvious: although appellants seek a judgment of more than $100,000 by virtue of the default judgment, counsel making the affidavit did not consider it worth while to go to the Court House and search the records himself.

Finally, and on page 18 of the reply, appellants' counsel argue that petitioner appellee is "estopped from amending her motion by now urging a new ground for the alleged nullity of the judgment, since

appellants cannot now amend their proof as to the fact that a certificate of residence was never filed." There are two answers to this argument. In the first place appellee does not have to amend her motion to raise this point because it is included in the following ground set forth in appellee's motion, which is found on page 70 of the record:

> "(b) That the order of this court directing publication of summons against this moving defendant does not comply with Section 412 of the Code of Civil Procedure of the State of California, in that the alleged facts in the affidavit of Fred S. Herrington upon which the order is based, are predicated not upon the affiant's knowledge but upon hearsay."

Furthermore, as we stated in our petition for rehearing, an order or judgment, void upon its face, may be attacked at any time. (See Appellee's Brief, pp. 20-25.) Since the trial Court may set it aside at any time, no motion is necessary to bring about that result. As the Court said in *Michel v. Williams,* 13 Cal. (2d) 198, "the Court has power to vacate an order, void upon its face, at any time upon its own motion or upon motion of a party."

ANSWER TO APPELLANTS' POINT V, THAT: "THE PETITIONER DOES NOT ATTACK THE JUDGMENT INSOFAR AS THE PUBLICATION WAS BASED ON THE FACT THAT THE PETITIONER WAS CONCEALING HERSELF TO AVOID SERVICE." (Appellants' Reply, p. 19.)

Appellants dignified this point of their reply by one sentence. We answer it by merely stating that

in Herrington's affidavit the hearsay facts set out therein dealt indiscriminately with the charge of concealment and the allegations that appellee could not after diligent search be found within the State of California. In other words, since the attack upon the affidavit is upon the ground of hearsay, the authorities cited by us which establish that a hearsay affidavit is insufficient, apply as well to an affidavit charging concealment as one alleging the plaintiff's inability to discover defendant's whereabouts after diligent search.

ANSWER TO APPELLANTS' POINT VI, THAT: "THE MARSHAL'S CERTIFICATE IS ADMISSIBLE EVIDENCE FOR AN ORDER OF PUBLICATION." (Appellants' Reply, p. 19.)

Under this head appellants' counsel say that "There was no particular reason for the Court to enter into a discussion *of the California practice* on the point, beyond its reference to the Federal cases of *Marx v. Ebner,* 180 U. S. 314, and *Cohen v. Portland Lodge,* 152 Fed. 357" (emphasis ours). Since California practice as to the service of summons governs the Court's action in this case and the California Courts have spoken, we cannot see how this Court's interpretation of Oregon law in *Cohen v. Portland Lodge* and the United States Supreme Court's application of the law as it applied to the District of Alaska in *Marx v. Ebner* can be considered as an interpretation of California law.

It is true that this Court in the *Cohen* case held a sheriff's return to be some evidence under Oregon

law. But in that case the affiant himself made a diligent search, including inquiry from the executors of the last will of the defendants' father and was advised that the defendants (minors) were in the Pacific Orphan Asylum of San Francisco. (See 152 Fed. 361.) And in holding that the return of the officer could be considered, it did so on the authority of *Marx v. Ebner* (supra). However, in the *Marx* case, the affidavit contained the positive averment that the defendant resided in another state, and the Court held that the return might be considered with the facts stated in the affidavit, *provided the other facts sworn to are sufficient.* (See end of opinion, 180 U. S. at 320.)

Since as this Court conceded in its opinion, California law determines, how can such cases of foreign jurisdictions override the decisions of the Courts of California that when the statute says "affidavit", it does not include an unsworn statement of anybody? When the Supreme Court of California said in *Rue v. Quinn,* 137 Cal. 651 at 655, that "if either of the facts (including that defendant cannot after due diligence be found within the state) does not *appear by affidavit,* the Court or judge has no jurisdiction to make the order and the order made thereon will be insufficient to sustain a judgment," it certainly was not recognizing a sheriff's or marshal's return as a substitute for an affidavit.

Appellants' counsel refer to California cases cited on pages 24 et seq. of their "Reply Brief for Appellants". On those pages they quote from *Rue v. Quinn* (supra) that: "the sheriff's return may be relied upon as a part of the evidence that the de-

fendant cannot be found within the county." That statement was not directed at all to the question of the sufficiency of the affidavit, but rather to the point, therein raised, that the Court lost the power to order service by publication by the fact that the summons had been previously returned to the office of the clerk. (137 Cal. 657.) The above quoted language from the decision was to establish that service had not been made and it was therefore proper to have a new summons issued.

In *Clarkin v. Morris,* 178 Cal. 102, cited by appellant on page 26 of said reply brief, the Court in describing the affidavit recites the fact that the affidavit referred to the return of the summons, but nowhere in that decision does the Court pass upon the question of whether a return can take the place of an affidavit. The affidavit in that case described the investigation of the *affiant,* including his inquiry of persons who not only were acquainted with the defendant sought to be served, but had acted as bondsmen for her.

In *Weiss v. Cain,* 73 Pac. 980, the affidavit was substantially the same as in *Rue v. Quinn* and the Court upheld the affidavit upon the authority of *Rue v. Quinn;* and it will be recalled that the affidavit in the latter case recited the search made by the affiant, and not by someone else, as does the affidavit in the case at bar.

Appellants' handling of the case of *Ligare v. California S. R. R. Co.,* 76 Cal. 610, well illustrates the lack of confidence of appellant's counsel in the point.

They state with reference to that case, that "diligence was proven by an affidavit that the summons and alias-summons had been placed in the hands of the sheriff of a certain county, and thereafter in the hands of other sheriffs, with instructions to make service, but that they had all returned the summonses with endorsed returns thereon or written responses that they had made diligent enquiries and search within their counties and could not find any of the defendants." (Appellants' Reply Brief, p. 25.)

A reading of the decision (76 Cal. at 612) will reveal that the affidavit at the outset described a search *made by the affiant* by an "inquiry of all persons from whom he (affiant) could expect to obtain information as to the residence of said defendants"; that the decision by italics emphasized that part of the affidavit, and that nowhere in the case was there involved the competency of hearsay statements in the affidavit, or of the right of the Court to consider on the motion, the returns of the sheriff or marshal.

On page 44 of "Brief for Appellee" we cited *Grigsby v. Wopschall,* 127 N. W. 605, in which the claim that the sheriff's return was evidence in support of the order of publication, was directly presented, and on which the Court held that the return of the sheriff was not evidence because it was not an "affidavit".

POINT VII OF APPELLANTS' REPLY REQUIRES NO COMMENT, AS IT IS MERELY ARGUMENT.

CONCLUSION.

In conclusion we respectfully submit that under the code section and the California decisions interpreting it, the judgment of the trial Court is entitled to an affirmance at the hands of this Court.

Dated, San Francisco,
October 26, 1943.

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